

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAIO GROUP INC, et al.,
Plaintiffs,
v.

No. C-10-01282 MMC (DMR)

**ORDER RE JULY 6, 2011 JOINT
DISCOVERY LETTER**GLBT LTD, et al.,
Defendants.

Before the Court is a joint discovery letter submitted by the parties on July 6, 2011. [Docket Nos. 65 (“Letter”) and 65-1 (“Attachment”).] The Court ordered Defendant GLBT Ltd. to submit additional information, which was filed on July 19, 2011. [Docket Nos. 68-1, 68-2, and 68-3 (collectively, “Plaintiffs’ Interrogatory Responses”).] Having considered the letter brief and the supplemental information, the Court finds that this matter is appropriate for determination without oral argument pursuant to Civil Local Rule 7-1(b). The Court hereby DENIES Defendant GLBT Ltd.’s request for an order compelling further responses to discovery and DENIES Plaintiffs’ request for a protective order.

I. Background

This is an action for alleged copyright and trademark infringement. Plaintiffs Io Group, Inc., Channel One Releasing, Inc. and Liberty Media Holdings, LLC (“Plaintiffs”) allege that Defendants GLBT, Ltd. (“GLBT”), Mash and New, Ltd., Port 80, Ltd., Steven Compton, and David Compton

1 operate websites from which members can upload and download erotic videos in a manner which
2 infringes upon Plaintiffs' copyrighted works and trademarks.

3 In the letter, Defendant GLBT seeks an order compelling Plaintiffs to provide additional
4 responses to interrogatories and document requests seeking information and documents regarding
5 Plaintiffs' damages. Specifically, Defendant seeks information and documents regarding Plaintiffs'
6 profits and earned revenues, arguing that this information is relevant to the determination of
7 statutory damages. Defendant also argues that Plaintiffs have waived any objections to the
8 interrogatories as they failed to assert specific objections to each of the interrogatories at issue.

9 Plaintiffs argue the requested information and documents are irrelevant to a determination of
10 either statutory or actual damages, and argue that there has been no waiver of objections to the
11 interrogatories, as they raised objections through general objections at the opening of their written
12 responses and during the meet and confer process. Further, Plaintiffs argue that the information and
13 documents sought by Defendant is highly confidential and sensitive commercial information, and
14 that they are therefore entitled to a protective order shielding the information from discovery.

15 **II. Discussion**

16 Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any
17 non-privileged matter that is relevant to any party's claim or defense. . . ." Fed. R. Civ. P. 26(b)(1).
18 The Rules permit courts to order discovery of trade secrets or other confidential commercial
19 information in a manner that restricts disclosure, such as through a protective order, upon a showing
20 of good cause. Fed. R. Civ. P. 26(c); *see Nutratech, Inc. v. Syntech (SSPF) Int'l, Inc.*, 242 F.R.D.
21 552, 554 (C.D. Cal. 2007). The court must strike a balance between the discovery-seeking party's
22 entitlement to "all information reasonably calculated to lead to the discovery of admissible
23 evidence," and the divulging party's need for protection from "undue burden . . . , including
24 protection from misuse of trade secrets by competitors." *Brown Bag Software v. Symantec Corp.*,
25 960 F.2d 1465, 1470 (9th Cir. 1992) (citations & quotation marks omitted).

26 Defendants seek further responses to Request for Production Nos. 16, 17, 18, 19, 22, 23 and
27 24 and Interrogatory Nos. 5, 6, 15, 16, and 17. With respect to the document requests at issue,
28 Request Nos. 16, 17, 18, and 19 seek documents that support Plaintiffs' damages contentions and

that “evidenc[e] the profitability of [Plaintiffs’] operations and of the items allegedly infringed,” and Request Nos. 23 and 24 seek documents “that establish any revenues earned by [Plaintiffs] in the past five years” for those items allegedly infringed and for any of Plaintiffs’ operations. Plaintiffs objected to six of the seven requests¹ at issue on the grounds that they “request[ed] irrelevant, immaterial, or inadmissible information,” and refused to produce any responsive documents. [Docket No. 65-1 at 6-8.] Defendant argues that Plaintiffs must “provide their accounts” for Defendants’ and their counsel’s review. (Letter at 6.)

The interrogatories seek information about the damages Plaintiffs have suffered as a result of Defendants’ alleged infringement. Defendants argue that Plaintiffs’ responses are insufficient, and that Plaintiffs need to explain their contentions about damages “by reference to their profit margins, and to include the profit margins for *all their works* and to include the profit margins for the alleged infringed works.” (Letter at 3.) (emphasis added). Plaintiffs did not assert specific objections to any of the interrogatories propounded by Defendant, instead setting forth the following “preliminary statement” preceding each Plaintiff’s set of responses:

[i]n making these responses, Plaintiff does not concede that the information sought is relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible evidence. . . . Plaintiff’s responses are made without, in any way, intending to waive, but rather intending to preserve . . . [] [t]he right to assert in any subsequent proceeding . . . all questions of foundation, relevancy, materiality, privilege, hearsay, and evidentiary admissibility of any responses provided herein.

(Plaintiffs’ Interrogatory Responses at 2.) Plaintiffs now argue that the requested information is irrelevant to any issues in the litigation.

Normally, all grounds for objections to interrogatories must be stated with specificity or the objection is waived. *See* Fed. R. Civ. P. 33(b)(4); *see also Mancia v. Mayflower Textile Svcs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008). However, for good cause, a court may excuse the failure to make specific objections. Fed. R. Civ. P. 33(b)(4). Given the lack of relevance of the requested

¹ Plaintiffs did not object to the seventh request (Request No. 22), seeking documents to support Plaintiffs’ contention that Defendants have engaged in false accounting, but instead responded that Plaintiffs do not have responsive documents in their possession. [Docket No. 65-1 at 7-8.]

information to “any party’s claim or defense” in this matter, the Court declines to deem Plaintiffs’ relevancy objections to the interrogatories waived.

Defendant’s arguments about the relevance of the requested information and documents are limited solely their relevance to the issue of *statutory* damages. However, it is not clear whether Plaintiffs have already elected to seek a statutory damages award, or whether they still reserve the right to seek an award of actual damages. *See* 17 U.S.C. § 504 (c)(1) (a “copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits [of the infringer], an award of statutory damages for all infringements involved in the action. . .”) Although Plaintiffs state in the letter that they seek an award of either actual damages or statutory damages, their responses to Request for Production Nos. 16-19 indicate that they are seeking “statutory, not actual damages.” (Attachment at 6-7.)

Regardless of whether Plaintiffs are seeking actual damages or statutory damages, Defendant has offered no support for the position that profits for the alleged infringed works, let alone *all* of Plaintiffs’ works, as Defendant has requested, are relevant to a determination of either type of damages.² A district court has wide discretion in assessing statutory damages for copyright infringement, and may consider such factors as

(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiff; (3) the value of the copyright; (4) the deterrent effect on others besides the defendant; (5) whether the defendant's conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.

Microsoft Corp. v. Nop, 549 F. Supp. 2d 1233, 1237 (E.D. Cal. 2008). “Notably, the factors include the *profits reaped by defendant and the revenues lost by plaintiff, not the plaintiff’s profits.*” *Apple, Inc. v. Psystar Corp.*, 673 F. Supp. 2d 926, 928 (N.D. Cal. 2009) (emphasis in original) (denying defendant’s motion to compel production of profit information in copyright action). Plaintiffs have

² In fact, Defendant appears to concede as much with respect to statutory damages in the joint letter, arguing that “[a]lthough it could be argued that Plaintiffs’ *profits* are not relevant to an award of statutory damages pursuant to the Copyright Act, the *revenues lost* to Plaintiffs certainly are.” (Letter at 5.) (emphasis in original). While it may be that some information about lost revenues is relevant to the issue of statutory damages, none of the discovery at issue seeks information about lost revenues. *See* discussion *infra*.

clarified that they are *not* seeking lost profits in this action. (Letter at 9.) Further, as the alleged infringer, it is Defendant's profits related to the alleged infringed works, and not Plaintiffs', that are relevant to the issue of actual damages. *See* 17 U.S.C. § 504 (a) (a "copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any *profits of the infringer* that are attributable to the infringement. . .") (emphasis added).

Similarly, the documents requested by Request Nos. 23 and 24, evidencing "revenues earned" by Plaintiffs in the past five years for alleged infringed items and for "any of [Plaintiffs'] operations," are not relevant to a determination of statutory or actual damages. Although Defendant repeatedly argues that it is entitled to discovery regarding Plaintiffs' "lost revenues," the requests as phrased do not seek documents evidencing Plaintiffs' lost revenues. They seek documents evidencing revenues *earned* by Plaintiffs, which is not the same thing. While the amount of revenues lost by Plaintiffs as a result of infringement is relevant to the determination of actual damages, and is one factor a court may consider in determining the amount of a statutory damages award, *see Microsoft Corp.*, 549 F. Supp. 2d at 1237, Defendant has made no showing that the amount of revenues *earned* by Plaintiffs for any of its works is relevant to the issue of damages. Therefore, Defendant's request for an order compelling further responses to discovery is DENIED. Plaintiffs' request for a protective order regarding information its profits and earned revenues is accordingly DENIED as moot.

III. Conclusion

For the foregoing reasons, Defendant GLBT's request for an order compelling further responses to discovery is DENIED, and Plaintiffs Io Group, Inc., Channel One Releasing, Inc., and Liberty Media Holdings, LLC's request for a protective order is DENIED as moot.

IT IS SO ORDERED.

Dated: August 8, 2011

